RE CHOP SIN GUAN MOH & ORS.

[O.C.J. (MacIntyre J.) April 19, 1965]

[Ipoh — Bankruptcy No. 54 of 1964]

Bankruptcy — Bankruptcy Rules, rr. 117 and 124 — Bankruptcy Ordinance, 1959, ss. 6, 10 and 97 — Application to stay proceedings.

An application was made by motion for an order to stay proceedings in a bankruptcy petition until the trial of an action in which the debtor sought to set aside a consent judgment passed in favour of the petitioning creditor. A preliminary objection was raised that the application could not be granted as it would result in the hearing of the petition being postponed in contravention of the provisions of the Bankruptcy Ordinance and the rules made thereunder. On this preliminary point,

Held: the court has power to stay proceedings under section 97 of the Bankruptcy Ordinance at any time and therefore the application in this case was not irregular or ill-conceived and if granted would not result in the infringement of any of the provisions of the Bankruptcy Ordinance or the rules made thereunder.

Cases referred to:—

(1) *In re a Debtor, ex parte Debtor* [1935] 1 Ch. 353.

(2) *In re M. A. Abdul Majid* [1954] M.L.J. 21.

(3) *Re Hawkins, ex parte Troup* [1895] 1 Q.B. 405.

MOTION.

Peh Swee Chin for the 3rd debtor.

E. K. Yeap for the creditor.

Cur. Adv. Vult.

MacIntyre J.: Mr. Peh Swee Chin on behalf of Lee Kau Lang, the 3rd debtor cited in Ipoh Bankruptcy Petition No. 54 of 1964 (hereinafter referred to as the debtor), moves the court by notice of motion dated 17th of March 1965 for an order to stay proceedings under the said petition until the trial and disposal of Ipoh High Court Civil Suit No. 83 of 1965. In that suit the debtor seeks to set aside as against himself a consent judgment passed in favour of the petitioning creditor in Ipoh High Court Civil Suit No. 379 of 1963 for the payment of a sum of $12,530.23, interest and costs by the debtor and two others, namely, the firm of Chop Sin Guan Moh and Lee Kau Say, the 1st and 2nd debtors respectively cited in the aforesaid bankruptcy petition.

The grounds on which the debtor seeks to set aside the consent judgment are:—

(i) That he was not indebted in the sum of $12,530.23 or any other sum to the petitioning creditor;

(ii) That the amount was owed by Chop Sin Guan Moh and Lee Kau Say but that he had been wrongly impleaded as a partner of Chop Sin Guan Moh; and

(iii) That his signature to the deed of compromise by virtue of which the consent judgment was passed was affixed under a mistake of fact and through fraudulent misrepresentation that he was signing the deed as the manager of Chop Sin Guan Moh.

When this motion first came up for hearing on the 5th of April, Mr. Yeap for the petitioning creditor raised a preliminary objection to the hearing of the application for stay of proceedings in a bankruptcy petition as being irregular and ill-conceived in that if the application was granted it would result in the hearing of the petition being postponed *sine die* in contravention of the provisions of the Bankruptcy Ordinance and the rules made thereunder. In support of this argument, he read the headnote In *re a Debtor: Ex parte Debtor,*(1) which is as follows:—

"Bankruptcy being a matter which affects not only the debtor and his creditors but also the general public, a duty is imposed upon the court to see that all the requirements of the Bankruptcy Act 1914 and the rules have been observed."

He then submitted that the specific provision of law which would be infringed if the motion was granted would be rule 124 of the Bankruptcy Rules which reads as follows:—

"After the expiration of one month from the day appointed for the first hearing of a petition (provided such petition shall have been duly served) no further adjournment of the hearing merely by consent of the parties shall be allowed except for the reasons set forth in rule 117 of these rules or for such other sufficient reasons to be stated in the order for adjournment as the court thinks fit; but in every such case unless an order for adjournment is made the court shall either make a receiving order or dismiss the petition."

My attention was also drawn to the discretionary power conferred on the court by rule 117 to adjourn the hearing of a petition to enable a debtor to call witnesses for the purpose of shewing cause against the petition; and to the failure of the debtor to notify petitioning creditor of his intention to deny or dispute the petition in accordance with the procedure prescribed by rule 115.

Elaborating further on the applicability of rule 124 counsel cited *In re M. A. Abdul Majid,*(2) which was a bankrupt's motion to annul a receiving order made against him on the ground that the order was a nullity by virtue of the postponement of the hearing of the petition *sine die* at an earlier stage of the proceedings in contravention of rule 126 of the Singapore Bankruptcy Rules which is the same in our rule 124. In that case, Brown Ag. C.J. held that rule 126 had been infringed but refused to make any order on the ground, *inter alia,* that the bankrupt had himself contributed to the infringement of the rule.

Mr. Peh Swee Chin contended that rule 124 did not affect the discretionary power of the court to adjourn the hearing of a petition *sine die* and submitted that the power of the court to stay proceedings on a bankruptcy petition is conferred by sections 10(2) and section 97 of the Bankruptcy Ordinance.

Mr. Yeap, in reply, argued that the provisions of section 10(2) were not relevant to an

application for stay of proceedings on a petition other than for the purpose stated in that section; and that section 97 applied only to application for stay of proceedings after a receiving order had been made. He cited with approval a commentary at page 493 of *Williams* on Bankruptcy (17th Edition) under section 113 of the English Bankruptcy Act 1914 in which the learned commentator expresses the opinion that because the court is empowered under section 5(4) and (5) corresponding to section 6(4) and (5) of our Ordinance to stay or dismiss bankruptcy proceedings in certain circumstances before a receiving order is made, it must be presumed that section 113 corresponding to our section 97 applied to applications for stay of proceedings after a receiving order had been made. The commentary reads as follows:—

"Compare the same provisions as to stay in section 5(4) and (5) *ante;* this section is presumably meant to apply to a stay of proceedings after receiving order, whereas section 5(4) and (5) applies to a stay of proceedings before receiving order where the alleged debtor disputes the petitioning creditor's debt. Moreover, section 5 only empowers the court to stay proceedings on 'the' petition, whereas perhaps this section empowers the court not only to stay proceedings on that particular petition but also to refuse to hear any other petition."

At the close of the argument, I reserved my ruling on the preliminary objection till to-day.

Now with regard to the objection taken under rule 124 of the Bankruptcy Rules, at least 3 requisites must be present to invite the attention of the rule, namely, (i) the application for the adjournment of the petition should have been made after the expiration of one month from the day appointed for the hearing of the petition; (ii) it should have been made by consent of parties; and (iii) that it was not made for the reason set out in rule 117. Since none of these requisites are present in the present application, I hold that the objection under rule 124 is misconceived. The decision in *In re Abdul Majid, supra,* as to the infringement of rule 126 was made on the facts of that case and the main issue for decision was whether the infringement of the rule vitiated all subsequent proceedings. Again, in my opinion, the headnote in *In re a Debtor: Ex parte Debtors, supra,* covers a wider ground than merited by the facts. The headnote is based on an observation made by the Court of Appeal that it was desirable that all the facts regarding proof of debt, service of the petition and the act or acts of bankruptcy should be recorded by the bankruptcy court so that the Court of Appeal may be satisfied that the provisions of section 5(2) of the English Bankruptcy Act (corresponding to our section 6(2)) had been strictly complied with.

I am also of the opinion that the discretionary power given to the court under section 10(2) to stay "any action, execution or other legal process against the property or person of the debtor" is limited for the purpose mentioned in section 10(1), namely, the protection of the estate while the official assignee administered it as an interim receiver appointed by the court.

As for the opinion of the learned commentator in *Williams* on Bankruptcy, it is manifestly clear from the commentary itself that his opinion is not based on any judicial pronouncement but on an unwarranted assumption that section 113 of the English Bankruptcy Act would be redundant in view of the provisions of section 5(4) and (5) unless it was meant to cover applications for stay of proceedings after a receiving order had been made. With all due respect, I beg to differ from that view. In my humble opinion section 113 (our section 97) was enacted to save the inherent power of the court to stay proceedings for sufficient reason even in circumstances not covered by section 6(4) and (5). Further, I fail to understand how the meaning of the words of section 113 which reads: "The court may at any time for sufficient reason make an order staying the proceedings under a bankruptcy petition" could be restricted to mean that the court could only exercise that power after a receiving order is made.

Now section 6(4) of our Ordinance empowers the court to stay proceedings on a bankruptcy petition when an appeal is pending against the judgment debt on which the petition is founded. Section 6(5) empowers the court to stay proceedings until a debt on which a petition is founded is adjudicated upon. What then is the remedy open to a judgment debtor against whom a receiving order is asked for in respect of an act of bankruptcy based on non-compliance of a notice to pay the judgment debt, where the time for appeal had lapsed or where the judgment is not appealable because it is based on a deed of compromise obtained by fraudulent misrepresentation? It would be absurd to suggest that the only remedy open under such or similar circumstances to stay proceedings was for the court to first make a receiving order and then stay the proceedings under section 97 to enable the debtor to take steps to set aside the judgment, notwithstanding the fact if a receiving order is made the debtor cannot sue on his own rights. I therefore hold that the power of the court to stay proceedings on a bankruptcy petition under section 97 is not limited to applications made after a receiving order had been made. It would appear that the bankruptcy court is even entitled to go behind a compromise decree passed by a court of competent civil jurisdiction.

In *Re Hawkins: Ex parte Troup,*[3] the Court of Appeal held in a majority judgment, that the court of bankruptcy has power to go behind a compromise judgment and reject it if

it was satisfied that the judgment was unfair and unreasonable even though it was not fraudulent. In the course of his judgment at page 408 of the report Lord Esher, M.R. obeserved:

"This court has now been sitting for a long time to administer the law under the Bankruptcy Act of 1883, and we have several times said that, where the debt relied on in the court of bankruptcy is founded on a judgment obtained against a debtor, the court is not bound by that judgment, although it is and must be binding between the parties for any other purpose. We have said that the court will go behind the judgment, and I think that the cases shew that the court will go behind a judgment by consent. I am of the opinion that a judgment obtained by a compromise does not of itself stop the court from going behind it. We have tried to say that the court will go into the whole transaction, because the question is not one of a dispute between the two parties; it is a matter which affect. and materially affect, the rights of all creditors who are not before the court when it has to determine whether a receiving order should or should not be made, which will or may result in the debtor being made a bankrupt."

And then at page 409:

"If the compromise is found to be a reasonable one the court will support the judgment; but if it is found not to be a reasonable compromise, although not fraudulent, then the court will not support the judgment. For instance, I know we have said that though both parties to the compromise knew all the circumstances and agreed to it, yet if the court finds that it was foolish, absurd, and improper, and one that ought not to have been made, they will not bind the whole body of creditors to that compromise. Still more, if the court finds that the compromise was made when one party knew all the circumstances and the other did not, then, even if there be no fraud, the compromise cannot be a fair one."

Applying the principles enunciated in this judgment to the facts of this motion, I am of the opinion that the application is neither irregular nor ill-conceived and if granted would not result in the infringment of any of the provisions of the Bankruptcy Ordinance or the rules made thereunder. The preliminary objection is therefore overruled and I am prepared to hear the arguments on the merits of the application.

Objection overruled.

Solicitors: *Peh Swee Chin; Yeap & Yeap.*

TAN KHENG ANN & ORS. v. THE PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Wee Chong Jin C.J. (Singapore) and Wylie C.J. (Borneo)) April 30, 1965]

Penal Code, ss. 34, 149 and 302 — Charge — Murder committed during rioting by detainees under Criminal Law (Temporary Provisions) Ordinance — Common intention and common object — Conjunctive allegations in charges — Whether bad in law.

Criminal Procedure — Special jury — Prosecution obtaining ex-parte order for special jury — Validity of order — Rules of natural justice — Special jury summoned and empanelled — Discharge of — Whether ex-parte order spent — New jury summoned and empanelled — Validity of — Criminal Procedure Code (Cap. 132), ss. 180, 228(2).

Criminal Procedure — Mode of trial — Separate trials — "Group" trials — Single transaction — Interests of justice — Interests of accused — Judge's discretion.

Evidence — Accomplice vel non — Interested witnesses — Corroboration — Implicating accused in a material particular — Non-direction — Effect of.

Courts of Judicature Act, 1964, s. 60(1) — Applicability.

On July 12, 1963 at about 1 p.m., a number of criminal law detainees, (estimated at between 70 to 90) on the penal settlement of Pulau Senang armed themselves with hoes, pieces of iron, parangs and bottles made a series of attacks on the administration buildings of the settlement, and proceeded to burn down most of the buildings of the settlement, break up petrol pumps, loot property, burn records and destroy machinery. In the course of these proceedings, the settlement superintendent and 3 others were killed and a number of the supervisory staff attacked and injured. Consequently 64 of the detainees were taken into custody, none of them offering any resistance, by a force of armed police who had come from Singapore in response to a radio telephone message sent by the settlement superintendent shortly before his death. In the event, a prosecution was brought against the said detainees and they were eventually committed for trial on 3 charges of murder under sections 302 and 149 of the Penal Code. Upon their committal, the prosecution, applied for and obtained an order *ex parte* under section 180 of the Criminal Procedure Code for a special jury to be summoned to try the case. A special jury was accordingly summoned and subsequently empanelled when the case came on for trial. Counsel for the prosecution then announced that he did not propose to proceed against 5 of the accused at that stage and those 5 were then stood down. The remaining 59 accused were then charged on all 3 charges and all claimed trial. The jury was sworn and the trial adjourned.

At the adjourned hearing it was discovered that one of the accused in the dock was one of those who should have been stood down at the first hearing of the trial and one of those stood down on that day should have been in the dock. The correct accused was then put in the dock and charged and claimed trial. The judge, then ruled that that accused could not be tried by the jury which had already been sworn because that would deprive him of his rights of challenge in respect of the jury. The jury was accordingly discharged, and the accused were remanded till the next Assizes. At the next Assizes the accused were again charged on all 3 charges and all claimed trial. The jury was then sworn and the trial proceeded. At the conclusion of the trial the jury found 18 of the accused guilty on all 3 charges of murder and the remaining 40 (one of the accused was discharged in the course of the trial) not guilty on all 3 charges of murder. These 18 persons convicted for murder appealed against their convictions.

On appeal it was argued *inter alia* that (i) the order for a special jury was invalid because it had been obtained *ex parte* and that therefore the trial was rendered a nullity *ab initio;* (ii) the accused had suffered prejudice for they would have felt greater confidence in a trial by a common jury and they had been deprived of the opportunity of being heard; (iii) even if the *ex parte* order was good when the first jury was empanelled, that order was as it were, spent and a second order which was not obtained would have been necessary for the special jury before the trial ultimately commenced; (iv) the charges were bad in law because if constructive liability was to be imputed to the accused it should have been by reason of section 34 and not section 149 of the Penal Code; (v) the charges were bad in law because "it averred the murder of one person in two different sets of circumstances"; (vi) the defence were